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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. ~~196~~ 25

W. B. AUSTIN, PLAINTIFF IN ERROR,

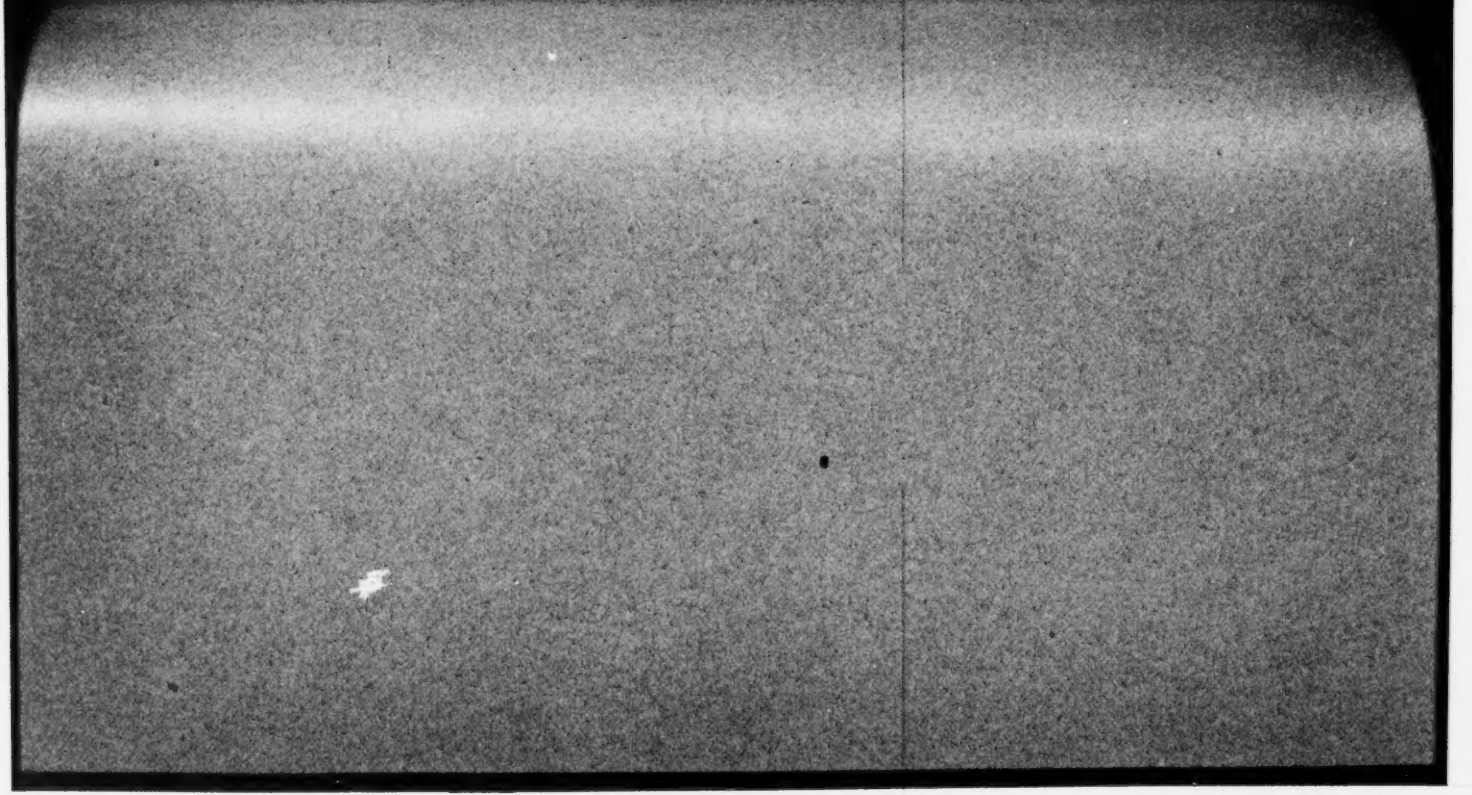
vs.

THE STATE OF TENNESSEE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

FILED JANUARY 14, 1899.

(17,259.)



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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 17, 1899.

a *State Cause.*

17th Circuit, Monroe County.

W. B. AUSTIN
vs.
THE STATE. } No. 4.

From the supreme court of Tennessee.

Filed September 2, 1898.

J. G. STUART, *D. C.*

1 MONDAY, *January* 17*th*, 1898, *A. D.*

Be it remembered that a circuit court for the county of Monroe and State of Tennessee was opened and held at the court-house, in the town of Madisonville, on the 3rd Monday of January, A. D. 1898, it being the 17th day of said month and the time appointed by law for the holding of said court—present and presiding, the Honorable Jas. G. Parks, judge, etc., of the 17th judicial circuit of Tennessee—when and where the following proceedings were had and entered of record, to wit:

WEDNESDAY, *January* 19*th*, 1898.

Court met pursuant to adjournment—present and presiding, the Hon. Jas. G. Parks, judge, &c.—when the following proceedings were had and entered of record, to wit:

Came the grand jury into open court in a body, headed by their foreman, W. L. Brown, and returned into court the following presentments, each of which are endorsed thereon a true bill and signed by each member of the grand jury, to wit:

STATE OF TENNESSEE
vs.
W. B. AUSTIN. } #664. S. Y.

MONDAY, *May* 16*th*, 1898, *A. D.*

Be it remembered that a circuit court for the county of Monroe and State of Tennessee was opened and held at the court-house, in the town of Madisonville, on the 3rd Monday of May, A. D. 1898, it being the 16th day of said month and the time appointed by law for the holding of said court—present and presiding, the Hon. Jas. G. Parks, judge, *and* &c., of the 17th judicial circuit of Tennessee—when and where the following proceedings were had and entered of record, to wit:

2 TUESDAY, *May* 17*th*, 1898.

Court met pursuant to adjournment—present and presiding, the Hon. Jas. G. Parks, judge, *and* &c.—when the following further proceedings were had and entered of record, to wit:

STATE OF TENNESSEE } vs. W. B. AUSTIN. } # 664. Selling Cigarettes.

Came the attorney general, who prosecutes for the State, and t defendant in his proper person, who being charged and arraig upon the indictment, for plea thereto says he is not guilty, and his trial puts himself upon the count-y; and the attorney general d the like; and thereupon, to try the issue joined, came a jury, to w W. S. Griffith, J. N. Hamilton, T. N. Webb, John McClung, W Bryant, C. W. Gregory, J. C. Alexander, Frank Airheart, W Walker, David McNabb, Geo. Carroll, and Joe E. Reagan, all g and lawful men, citizens of Monroe county, who, being duly su moned, elected, impanneled, and sworn, after hearing all the e dence and receiving the charge of the court, upon their oath say they find the defendant guilty as charged. It is therefore c sidered by the court that the defendant be fined fifty dollars, a that he pay all costs of this cause, and that he remain in custo until said fine and costs are paid or secured. Thereupon comes t defendant and moves the court for a new trial; which motion is the court overruled; to which action of the court defendant e cepts in law and prays an appeal to the next term of the supre court, at Knoxville, Tenn., and tenders his bill of exceptions, whi is signed, sealed, and made part of the record of this cause.

And the appeal is thereupon granted; and thus came defenda and along with him W. Morris Harrison, J. W. Culton, a
3 J. Parker, his sureties, who acknowledge themselves indebt to the State of Tennessee in the sum of two hundred a fifty dollars, but to be void if the above-named defendant sh make his personal appearance at the January term, 1899, at t court, to perform and abide by the judgment in the supreme cou and not depart the court without leave.

Bill of Exception in the Above-entitled Cause of Indictment.

In the Circuit Court of Monroe County.

STATE OF TENNESSEE } vs. W. B. AUSTIN. } # 664.

STATE OF TENNESSEE, } *Monroe County.* }

Circuit Court, January Term, 1898.

The grand jurors for the State aforesaid, being duly summon elected, impanneled, sworn, and charged to inquire for the body the county aforesaid, upon their oaths present that W. B. Aus heretofore, to wit, on the 1st day of November, 1897, in the coun aforesaid, did unlawfully sell cigarettes, against the peace and d nity of the State.

A. J. FLETCHER, *Att'y Gen.*

Endorsed: #664 Presentment. A true bill. W. L. Brown, foreman grand jury. Selling cigarettes. State of Tennessee — W. B. Austin. Clerk's summons for State: W. G. Brown, Horace Minnis, Tom Reynold. A. J. Fletcher, att'y general. Filed January 25th, 1898. G. W. Humphreys, clerk.

The following evidence: This defendant was on the 1st day of November, 1897, a resident of and merchant in the town of
4 Madisonville, said Monroe county, Tennessee, and in no way connected with the American Tobacco Company, as agent — otherwise; that just prior to said November, 1897, the defendant purchased, in the State of North Carolina, from the American Tobacco Company, a corporation of the State of New Jersey, and having a factory for the manufacture of cigarettes in Durham, N. C., and similar factories at other points in the United States, but having no factory, office, nor warehouse in the State of Tennessee, a number of packages, each containing 10 dates of Durham cigarettes; that these cigarettes were manufactured by the American Tobacco Company at its factory in said town of Durham, *and* etc., and these packed by it in quantities of 10 in pasteboard slide-boxes, upon each of which such box*es* or package*s* were printed the names of the manufacturers of the cigarettes therein contained, the name or brand of the cigarettes therein contained, the number of the factory and internal-revenue collections or manufacturing district in which said factory was located, the number of cigarettes contained in the box or package, the caution notice required by the laws of the United States, the internal-revenue stamp for 10 cigarettes pasted across the end of such box or package, so as to act as a seal thereon and thereof, and which had to be broken and destroyed to open said box or package, and *on* the other requirements of the laws and regulations of the United States governing the packing and sale of cigarettes. A package in all respects similar to those bought by defendant at Durham, N. C., is hereto attached, marked "Exhibit A." These packages were packed and manufactured by said American Tobacco Company at Durham, N. C., and were by it shipped from said town of Durham, N. C., to defendant by the Southern Express Company, without case, covering, or enclosure of any kind around or about any of said packages, but were by said American Tobacco Company piled upon the floor of its warehouse in Durham, N. C., and said Southern Ex-
5 press Company notified to come and get them, and said express company, by its agent, took them, the said enclosed packages, and placed them in an open basket, already and heretofore in the possession of said Southern Express Company; that these packages were brought to the place of business of defendant by an agent of said express company in the same open basket in which they had been placed by said express company at Durham, N. C., and by said agent lifted from said basket onto the counter in the place of business of defendant, and so delivered to and receipted for by the defendant; that said basket was not left with defendant at all, but was carried away from defendant's business by said agent

of said express company immediately upon the delivery of said packages of cigarettes; that defendant immediately upon his receipt of said packages, as aforesaid, put them on sale, without br-aking, and sold one of them on said Nov. 1st, 1897, to W. G. Brown, an adult resident of said Monroe county, Tennessee, said sale being in Monroe county, Tennessee, and within one year before the finding of this indictment.

This was all the evidence.

The court charged the jury, but the charge, except for failure to give the instructions hereinafter set out as prayed, was not excepted to.

The defendant at proper time submitted the following request for instructions:

1st. If the jury should believe that the defendant sold to Brown a package of 10 cigarettes, which package had been bought by defendant at Durham, N. C., and shipped to him from Durham, N. C., without the enclosure, *there* the statute of the State of Tennessee forbidding the sale of cigarettes would be, as to such a sale, inoperative, as in conflict with the Constitution of the United States, and the defendant should be acquitted.

6 2nd. If the jury shall believe that defendant bought and imported from another State cigarettes and sold such cigarettes in one of the original packages in which imported and without breaking the same, you should acquit.

3rd. If the jury believes that all the facts testified to in this cause are true, then the court charges you that the statute under which defendant is indicted is, as applied to such a state of facts, unconstitutional, and the defendant should be acquitted.

4th. If the jury believe that all the facts testified to in this — are true, the court charges you that you should fine the defendant not guilty.

The court refuses to give any of said instructions, because the proofs show that the sale was not an interstate transaction, but a transaction between the citizens of the United States, and to the refusal of his honor to give said instructions defendant excepted, and excepted separately to his refusal to give each of said instructions respectively.

The defendant tendered this his bill of exceptions to the judgment of the court overruling his *realities* for a new trial; which is signed, sealed, and ordered to be made a part of the record.

JAS. G. PARKS, *Judge.*

7 STATE OF TENNESSEE *vs.* W. B. AUSTIN. } Selling Cigarettes. No. 664.

State tax	$5.00
County tax	2.50
Attorney's fee	5.00

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Clerk Humphreys, 3 dockets, 30c.; entry, 25c.; indct., 25c.; filing indct., 25c.; 2 cap's, $1.50; judg., 75c.; jury, 10c.; motion for new trial, 25c.; appeal bond and sec., 75c.; ord. granting ap'l, 25c.; bill cost, 50c.; trans. for supreme court, 3,000 words, $3.00; post., 25c.; orders, 50 cents	8.60
Sheriff W. R. Sloan, one arrest and bond, —; travel for officer, 90 miles, at 8, 7.20	8.45
Wit's W. G. Brown, 2 d	2.00
" Horace Minnis, 1 d	1.00
" Tom Reynolds, 1 d	1.00
	$33.55

STATE OF TENNESSEE, }
Monroe County. }

I, G. W. Humphreys, clerk of the circuit court in and for the county and State aforesaid, do certify that the foregoing is a true and perfect copy of the proceedings had and entered of record in this office.

Given under my hand and seal of court, at Madisonville, Tennessee, this Aug. 15, 1898.

G. W. HUMPHREYS, *Clerk.*

8 Filed Dec. 21, 1898. J. G. Stuart, deputy clerk.

W. B. AUSTIN }
vs.
THE STATE. }

Opinion.

W. B. Austin prosecutes this appeal in error from the judgment of the circuit court of Monroe county, whereby he was sentenced to pay a fine of fifty dollars and costs of suit for unlawfully selling cigarettes. He admits the sale, but denies that it was unlawful.

Austin, who was a citizen and merchant of Monroe county, Tennessee, purchased from the American Tobacco Company, a New Jersey corporation, at its factory in Durham, North Carolina, a lot of cigarettes, in packages of ten cigarettes each, which it shipped thence by express to him at his place of business, in this State, and there he sold one of these packages, without breaking, to W. B. Brown, an adult citizen of the same county.

The statute under which the conviction was had unconditionally prohibits all sales of cogarettes, whether manufactured in this State or elsewhere.

It provides: "That it shall be a misdemeanor for any person, firm, or corporation to sell, offer to sell, or to bring into the State for the purpose of selling, giving away, or otherwise disposing of, any cigarettes, cigarette paper, or substitute for the same; and a violation of any of the provisions of this act shall be a misdemeanor,

punishable by a fine of not less than fifty dollars." Acts 1897, ch. 30, sec. 1.

Austin concedes that his sale to Brown was clearly within the prohibition of this act; yet he says it was lawful, nevertheless. The substance of his contention is that his sale was of an imported
9 commercial article in the original package, and *and* that the statutory prohibition, as applied to such a sale, is obnoxious to the commerce clause of the Federal Constitution and therefore null and void.

In considering this contention we raise two vital inquiries—whether or not cigarettes are legitimate articles of commerce and whether or not the sale shown in this case was of an original package in the true commercial sense.

1. Are cigarettes legitimate articles of commerce? We think they are not, because wholly noxious and deleterious to health. Their use is always harmful, never beneficial. They possess no virtue, but are inherently bad, and bad only. They find no true commendation for merit or usefulness in any sphere. On the contrary, they are widely condemned as pernicious altogether. Beyond question, their every tendency is toward the impairment of physical health and mental vigor.

There is no proof in the record as to the character of cigarettes, yet their character is so well and so generally known to be that stated above, and the courts are authorized to take judicial cognizance of the fact. No particular proof is required in regard to those facts which by human observation and experience have become well and generally known to be true (Schollenberger *vs.* Pennsylvania, 171 U. S.; 1 Greenl. Evi., sec. 6; 1 Whort. Evi., sec. 282; 1 Jones Evi., secs. 129 and 134; Lanfeor *vs.* Masteor, 18 La. Am., 497; S. C. 89; Am. —, sec. 658 and note 693; State *vs.* Govette, 11 R. I., 592; Watson *vs.* State, 55 Ala., 158), nor is it essential that they shall have been formally recorded in written history or science to entitle courts to take judicial notice of them. Boullemet *vs.* State, 28 Ala., 83; 12 Am. & Eng. Ency. of Law, 199.

It is a part of the history of the organization of the volunteer army in the United States during the present year that large number of men, otherwise capable, had rendered themselves unfit for
10 service by the use of cigarettes, and that among the applicants who were addicted to the use of cigarettes more were rejected by examining physicians on account of disabilities thus caused than for any other, and perhaps every other, reason.

It is also a part of the unwritten history of the legislation in question that it was based upon and brought to passage by the firm conviction in the minds of legislators and of the public that cigarettes are wholly noxious and deleterious. The enactment was made upon this idea and alone for the protection of the people of the State from an unmitigated evil.

Such being the nature of cigarettes, they cannot be legitimate articles of commerce, and consequently are not within the provision of the Federal Constitution (art. 1, sec. 8, cl. 3) in relation to the

regulation by Congress of commerce with foreign nations and among the several States and with the Indian tribes.

Only those things which are in fact commodities in some true sense, and as such are proper things for importation and use, can be legitimate articles of commerce and within the scope of the constitutional provision *involved* by the defendant in this case. Regulation of traffic in things not suited for commerce was not by that provision delegated to Congress.

Every State has the right under its reserved police power to prohibit the importation and sale of all articles inherently unworthy of commerce and unfit for the use of its people. Indeed, an active duty rests upon the legislative branch of the State government to enact appropriate laws for the protection of the public against the hurtful influence of such articles, and in the discharge of that important duty the members of the legislature must be allowed to act in accordance with the dictates of their own best judgment.

This does not mean, however, that the State legislature may override congressional legislation on the subject, or that the State
11 has the paramount right to determine what is and what is not a legitimate article of interstate or international commerce. The reverse is true. Congress has the superior right in the determination of that question, and its decision when made is controlling; but if the question arises in the State in advance of congressional action, as in the present instance, the State legislature may and should act according to its own deliberate view of the matter, and its action when taken is and should be conclusive until Congress shall have given some adverse expression on the same subject.

We are mindful of the rule that the silence of Congress in relation to articles confessedly suited for commerce is to be taken as legally equivalent to its declaration that the transportation of those articles into the States shall be free and unrestricted (Mobile *vs.* Kimball, 102 U. S., 691; Robbins *vs.* Shelly, 120 U. S., 492; Leisk *vs.* Hordin, 135 U. S., 100; State *vs.* Scott, 98 Tenn., 260); but congressional non-action upon the antecedent question as to whether or not other articles are suited for commerce is not tantamount to an affirmation by that body that they are so. Articles of the former class are already within the domain of congressional regulation, while those of the latter class are as yet beyond that domain and within control of the States, and, from the nature of the case, must remain so unless and until affirmatively determined by higher authority to be worthy of commerce and thereby transferred to the other class.

The right of a State to protect its people in their comfort, health, and safety against the importation and sale of non-commercial articles has long been recognized and never questioned by the Supreme Court of the United States. License cases, 5 How., 504; Bowman *vs.* Chicago, 125 U. S., 465; Hannibal *vs.* St. J. R. R. Co. *vs.* Husen, 95 U. S., 465; Leisy *vs.* Hardin, 135 U. S., 100; Plumley *vs.* Massachusetts, 155 U. S., 461; Collins *vs.* New Hampshire, 171 U. S., —; Schollenberger *vs.* Pennsylvania, 171 U. S., —.

12 In the Licence cases Mr. Justice Catpon observed that what belongs to commerce is within the jurisdiction of the United States, and that what does not belong to commerce is within the jurisdiction of the State, and by the State may be excluded from introduction. 5 How., 600.

The statute of Pennsylvania impeached in Schollenberger's case (171 U. S., —) was adjudged violation of the commerce clause of the Federal Constitution, because it prohibited the importation and sale of pure oleomargorine. In the course of his opinion in that case Mr. Justice Peckham attached controlling importance to the fact that pure oleomargarine, as contradistinguished from that which was adulterated, was a wholesome article of food and had been recognized by Congress as a commodity suitable for commerce, and, in recognition of the State's right to exclude the adulterated article, said: "The bad article may be prohibited, but not the pure and healthy one."

In Plumley's case (155 U. S., 467) it was said in effect by the court, speaking through Mr. Justice Harlan, that deceptive discoloration or adulteration of imported oleomargarine removed it from the domain of congressional regulation and subjected it to unconditional exclusion by State law.

The New Hampshire enactment involved in the Collins case (171 U. S., —) provided for the exclusion of all oleomargarine not of a pink color. It was held to be invalld for the reason that it virtually excluded pure oleomargarine, which was never naturally pink in color, and which was a proper and well-recognized commercial commodity.

The case of Leisy *vs.* Hardin, 135 U. S., 100, is the one most urged upon our attention by counsel for Austin. That case, however, like all the others, recognized the right of the State, under its police power, to prevent the introduction of non-commercial articles
13 among its people. Mr. Chief Justice Fuller distinctly places the court's decision upon the ground that the commodities whose importation and sale were so greatly restricted by the Iowa statute there examined had been recognized by the usages of the commercial worlds, the laws of Congress, and the decisions of courts as proper articles of commerce, and were therefore subject, in the first instance, to congressional regulation only.

In the conclusion of the opinion he said: "Whatever our individual views may be as to the deliterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognize as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by State laws amounting to regulation while they retain that character; although at the same time, if directly dangerous in themselves, the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them."

That case, then, as the others that declare State restrictions and prohibitions unauthorized and invalid, is distinguishable from the present on- in the fundamental and over-controlling fact that the articles there in question were commercial commodities in some

true sense, and as such appropriately recognized, while those here in question are not so.

Moreover, besides the conclusive recognition received by those articles, they stand upon a higher plane in respect of inherent merit than cigarettes, for they are confessedly beneficial in some instances and for some purposes, while cigarettes have no redeeming qualities. The Iowa statute upon its face distinctly acknowledged that the restricted articles possessed some virtue by allowing importations and sales of them for certain purposes and under certain restrictions.

In no instance has a State's right of authority and control been denied when the commodity restricted or prohibited was not first found to be a proper subject of commerce, and therefore
14 within the jurisdiction of Congress and beyond the jurisdiction of the State. The existence of that fundamental fact has always been the decisive criterion, and the burden of showing it is upon the complaining party.

All intendments are in favor of the constitutionality of every statute passed with requisite form and ceremony (Cooley's Const. Lim., 5th ed., 218; Black's Const. Law., sec. 28; Suth. Stat. Com., sec. 332; Railroad *vs.* Harris, 99 Tenn., 703); hence the burden is upon the person who assails a State's restrictive or prohibitory statute so passed as an unwarranted interference with interstate or international commerce to show that the particular article involved is a legitimate subject of commerce. If that fact be not made to appear in some appropriate way, his assailment must be unsuccessful.

Mr. Chief Justice Marshall, in Brown *vs.* Maryland, 12 Wheaton, 436, wherein a State statute was challenged for repugnance to the commerce clause of the Federal Constitution, remarked: "It has been truly said that the presumption is in favor of every legislatice act, and that the whole burden of proof lies on him who denies its constitutionality."

The same rule was announced and emphasized by Mr. Chief Justice Waite in this language:

"Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is known beyond a reasonable doubt. One branch of the Government cannot encroach on the domain of another without danger.

The safety of our institutions depends in no small degree on a strict observance of this salutary rule."

Sinking Fund cases, 99 U. S., 718.

If there were only a doubt, then, that cigarettes are legitimate articles of commerce, that doubt would be resolved against
15 the defendant and this act would be sustained.

But, as already stated, they are clearly not so (as the court may judicially know, Schollenberger *vs.* Pennsylvania, 171 U. S., —), and the passage of the act is a legislative determination to that effect which must be treated as conclusive of the question, in the absence of congressional expression to the contrary.

Congress has laid a tax on cigarettes, prescribing the forms in which they may be put up and the manner in which they shall be stamped. Rev. Stat. U. S., sec. 3392. This was done, however, for purposes of revenue only, and, without more, was not a recognition of them as legitimate articles of commerce. It was no expression on the subject of commerce one way or the other. Indeed, all internal-revenue legislation is referable to a different provision of of the fundamental law (Const. U. S., art. 1, sec. 8, *ch.* 1), and should be construed as relating to questions of revenue only, unless obviously intended to include some additional subject, which is not true in this instance.

The fact that Congress has declared by general statute (Rev. Stat., sec. 3243) that the payment of any tax imposed by the internal-revenue laws for the carrying on of any trade or businsss shall not authorize the pursuit of that trade or business in any State forbidding the same, nor prohibit State taxation thereon, indicates unmistakably that Congress does not intend by the imposition of such special tax to reach, determine, or in any way affect questions appertaining to interstate or international commerce. The imposition of the tax is aside from all those questions.

The statement herein that the taxation of cigarettes is not a recognition of them as proper commercial commodities is sustained by the reasoning and decision in the case of Plumley *vs.* Pennsylvania, 155 U. S., 461.

2. Was the sale shown to have been made in this case a
16 sale of an original package in the true commercial sense? We think not.

It may be truly said to have been an original package for the purpose of taxation, because put up by the manufacturer, in the first instance, in one of the forms prescribed by the internal-revenue statute (Rev. Stat. U. S., sec. 3392); yet it was not an original commercial package, because not sold and transported apart from other like articles, but in the same general receptacle with them.

Speaking generally, we would say that an original package as applied to interstate and international commerce is a package, bundle, or aggregation of goods put up, in whatever form, covering, or receptacle, for transportation and as a unit transported from one State or nation to another.

In Guckheimer *vs.* Sellers, 81 Fed. R., 997, the court said: "An original package, within the meaning of the law of interstate commerce, is the package delivered by the importer to the carrier at the initial point of shipment in the exact condition in which shipped. In the case of liquors in bottles, if the bottles are shipped singly each is an original package, but if a number are fastened together and marked or are packed in a box, barrel, crate, or other receptacle, such bundle, box, barrel, crate, or other receptacle constitutes the original package."

The supreme court of Iowa considered this question in McGregor *vs.* Cone, 39 L. R. A., 484, and upon the authority of numerous cited cases ruled, as correctly stated in the head-note, as follows:

1. An original package is that package which is delivered by the

importer to the carrier at the initial point of shipment in the exact condition in which it was shipped.

2. The determination of the internal-revenue department that a package is a proper and original package for purposes of taxation does not show that it is an original package of commerce.

17 3. A pine box, in which are packed for commercial shipment packages of cigarettes, each of which contains ten cigarettes and is sealed with an internal-revenue stamp, without any other packing or inclosure around or about them except the box itself, is the original package of commerce, and when that is opened the packages of cigarettes are subject to the police power of the State as a part of the common mass of property therein.

The material facts of the present case are that the defendant purchased from the American Tobacco Company, at its factory in Durham, North Carolina, a lot of cigarettes manufactured by that company at that factory, and there by it put into pasteboard boxes, in quantities of ten cigarettes to each box; that each of these boxes, known as packages, was separately stamped and labeled, as prescribed by the United States revenue statute; that after defendant's purchase the American Tobacco Company piled upon the floor of its warehouse in Durham, North Carolina, the number of boxes or packages sold and, having done so, notified the Southern Express Company to come and get them, and said company, by its agent, took them from the floor and placed them in an open basket already and previously in the possession of the Southern Express Company, and in that basket had them transported by express to the defendant's town in Tennessee, and there an agent of the same express company took the basket to the defendant's place of business and lifted from it on to the counter of the defendant the lot of detached boxes or packages of cigarettes, and thereupon took a receipt and departed with the empty basket. Thereafter the defendant sold one of these boxes or packages without breaking it, and for that sale he stands convicted.

Under these facts it is entirely manifest to our minds that the basket with its contents made one original package in the

18 true commercial sense, each box or package of cigarettes being a constituent part thereof, and that the original commercial package was broken, and each box or package of cigarettes assumed a separate identity before the law when the basket was relieved of its contents.

This is true, though the basket was open all the while and was filled and emptied by the agent of the express company.

A box, crate, barrel, or basket filled with goods for shipment and actually transported from a citizen of one State to a citizen of another State is no less a receptacle of the good- in a legal sense, and such receptacle is no less an original commercial package because open and not covered.

The presence or absence of a covering to a receptacle so used is of no consequence in determining what is and what is not an original package.

In South Dakota *vs.* Chapman, 10 L. R. A., 432, and also in Rion

vs. Alabama, 10 L. R. A., 430, it appeared that whiskey in bottles separately wrapped had been packed and shipped in uncovered boxes furnished by the shippers, and the court held in each case that the open boxes and not the separate bottles were the original commercial packages.

The ownership of the basket used in the shipment involved in this case, whether in the shipper or the carrier, is not disclosed. If the defendant predicated anything of ownership in the carrier, the burden was upon him to show that ownership. To avail himself of the protection afforded by the Federal law in relation to the sale of original packages he must prove every fact essential to show that his sale was of such a package. Keith *vs.* Alabama, 10 L. R. A., 431.

But we regard the question of such ownership as wholly immaterial, for in taking the basket to the factory of the shipper
19 and there putting the cigarettes in it the express company's agent was acting for the seller, and the legal effect of his action was the same as if the basket had been procured and filled by the shipper alone.

It is perfectly obvious, moreover, that this plan of shipment was resorted to as a mere device for the purpose of evading the State law against the sale of cigarettes. Prior to the passage of this law, as is well known, no such scheme was adopted in the transportation of such articles, and the carrier was not called upon to play so unusual a part in such a matter.

Our conclusion upon the whole case is: First, that cigarettes are not legitimate articles of commerce, and, consequently, that their importation and sale are not within the scope of the commerce clause of the Federal Constitution, but are subject to State control and prohibition; and, secondly, that if they were legitimate articles of commerce, the sale for which the defendant stands convicted was not of an original commercial package, and hence was not protected by that clause of the Federal Constitution.

Since cigarettes are not legitimate articles of commerce and as such within the domain of congressional regulation, the statute here called in question is valid as a whole—that part which prohibits the importation and sale of cigarettes manufactured out of the State, as well as that part prohibiting the sale of those manufactured in the State—and the defendant's conviction is sustainable under the statute generally or under the former part, without reference to the question of original package; but if they were legitimate articles of commerce and the former part of the statute therefore invalid, the latter part would remain valid nevertheless (State *vs.* Scott, 98 Tenn., 254) as an internal police regulation (Kidd *vs.* Pearson, 128 U. S., 1; Mugler *vs.* Kansas, 123 U. S., 623; Plumley
20 *vs.* Massachusetts, 155 U. S., 461), and the defendant's conviction would be sustainable thereunder, because his sale to Brown was not of an original commercial package, but only of a part thereof after it had been broken and its contents thereby made subject to the laws of the State like other local property of the same

class. Leisy *vs.* Hardin, 135 U. S., 100; Schollenberger *vs.* Pennsylvania, 171 U. S.

We are aware that Judge Lurton, for whose opinion we have great respect, ruled otherwise in the case of Soire *vs.* The State, 82 Fed., 615, upon a record very similar to this one; yet we believe our conclusion entirely sound.

Affirmed.

CALDWELL, *J.*

21 Supreme Court of Tennessee, at Knoxville, September Term, 1898.

SATURDAY, *November 19th*, 1898.

Court met pursuant to adjournment.

Present and presiding: The Honorable Chief Justice D. L. Snodgrass and the Honorable Aswociate Justices W. C. Caldwell, John S. Wilkes, W. K. McAllister, and W. D. Beard.

The minutes of yesterday were read and signed, when the following proceedings were had, to wit:

W. B. AUSTIN *vs.* THE STATE. } Affirmed.

Came the attorney general on behalf of the State; whereupon this cause was heard upon the transcript of the record from the circuit court of Monroe county. After consideration by the court, it appearing that there is no error in the proceedings and judgment of the court below, the same is in all things affirmed.

It is therefore ordered by the court that the State of Tennessee have and recover of W. B. Austin the sum of $50.00, the fine assessed against him in the court below, and all the costs of this cause, and that he remains in the custody of the sheriff until said fine and costs are paid, secured, or otherwise satisfied according to law, and for the execution of this judgment this cause is remanded.

22 Office of clerk of the supreme court for the eastern division of the State of Tennessee.

I, Alex. McMillan, clerk of said court, do hereby certify that the foregoing is a true, perfect, and complete copy of the transcript of the record from the circuit court of Monroe county and of the judgment and opinion of the supreme court pronounced at its September term, 1898, in the case of W. B. Austin *vs.* The State, as the same appears of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of the court, at office, in Knoxville, Tenn., on this the 24th day of December, 1898.

[Seal of the Supreme Court, Knoxville, Tenn.]

ALEX. McMILLAN, *Clerk*,
By —— ——, *D. C.*

Clerk, Alex. McMillan, making transcript..... 7.7
" " taking appeal bond, .50; fil'g pet., .25. .7

$8.4

Rec'd of J. Parker, att'y, 8.45, above cost.
ALEX. McMILLAN, *Clerk.*

23 Filed January 2, 1899. Alex. McMillan, clerk.

In the Supreme Court of Tennessee.

W. B. AUSTIN
vs.
STATE OF TENNESSEE.

Petition for Writ of Error.

To the Hon. David L. Snodgrass, chief justice of the supreme court of Tennessee:

Now comes W. B. Austin, the plaintiff in error in the above-entitled cause, by his attorney, and says that on the — day of November, 1898, the supreme court of Tennessee, being the highest court in the State of Tennessee in which a decision in the above-entitled cause could be had, entered a final judgment herein in favor of the State of Tennessee and against the plaintiff in error, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed, to the prejudice of the plaintiff in error, in that the validity of a certain statute of the State of Tennessee, constituting chapter 31 of Acts of 1897, having been drawn in question by the plaintiff in error, on the ground that they were repugnant to sec. 8 and sec. 10 of art. 1 of the Constitution of the United States, the decision of this court was in favor of the validity of said statutes and against the right set up under the said clause of the United States Constitution, as aforesaid, and this plaintiff in error was fined and made otherwise liable to penalty.

Wherefore said plaintiff in error, W. B. Austin, prays that a writ of error may issue in this behalf from the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings, opinion, and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States, and that the said judgment and decree may be re-examined and reversed.

J. PARKER,
Att'y for Plaintiff in Error.

24 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Tennessee, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of Ten-

nessee, at the fall term 1898 thereof, at Knoxville, Tennessee, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between State of Tennessee, respondent, and W. B. Austin, appellant, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause
25 of the Constitution, or of a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said W. B. Austin, appellant, as aforesaid, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 29th day of December, in the year of our Lord one thousand eight hundred and ninety-eight.

[The Seal of the Circuit Court, District of East Tenn.]

HENRY O. EWING, *Clerk*,
By J. T. CARTER,
Deputy Clerk of the Circuit Court of the United States for the East'n Dist. of Tenn.

STATE OF TENNESSEE, *ss*:

Allowed by—
D. L. SNODGRASS,
Chief Justice of the Supreme Court of Tennessee.

Filed January 2, 1898.

ALEX. McMILLAN, *Clerk*.

26 Know all men by these presents that we, W. B. Austin, as principal, and —— ——, as sureties, are held and firmly bound unto State of Tennessee in the full and just sum of ten hundred ($1,000.00) dollars, to be paid to the said State of Tennessee,

certain attorney, executors, administrators, or assigns; to whi payment, well and truly to be made, we bind ourselves, our hei executors, and administrators, jointly and severally, by these pre ents.

Sealed with our seals and dated this — day ——, in the year our Lord one thousand eight hundred and ninety-eight.

Whereas lately, at a supreme court of the State of Tennessee, i a suit depending in said court between State of Tennessee, r spondent, and W. B. Austin, appellant, a judgment was rendere against the said W. B. Austin that he pay a fine of fifty dollars an the costs of the cause, and the said W. B. Austin having obtaine writ of error and filed a copy thereof in the clerk's office of the sai court to reverse the judgment in the aforesaid suit, and a citatio directed to the said State of Tennessee, citing and admonishing to be and appear at a Supreme Court of the United States, at Wash ington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if th said W. B. Austin shall prosecute his writ of error to effect and a swer all damages and costs if he fail to make his plea good, the the above obligation to be void; else to remain in full force an virtue.

W. B. AUSTIN, [SEAL.]
By J. PARKER.
J. W. CULTON. [SEAL.]
J. A. ALBRIGHT. [SEAL.]

Sealed and delivered in presence of—

—— ——.

Approved by—
D. L. SNODGRASS,
Chief Justice of the Supreme Court of Tennessee.

Filed January 2, 1899.

J. G. STUART, *D. C.*

27 UNITED STATES OF AMERICA, *ss:*

To the State of Tennessee, Greeting:

You are hereby cited and admonished to be and appear a a Supreme Court of the United States, at Washington, withi thirty days from the date hereof, pursuant to a writ of erro filed in the clerk's office of the supreme court of Tennessee, wherei W. B. Austin is plaintiff in error and you are defendant in error, t show cause, if any there be, why the judgment rendered against th said plaintiff in error, as in the said writ of error mentioned, shoul not be corrected and why speedy justice should not be done to th parties in that behalf.

Witness the Honorable D. L. Snodgrass, chief justice of the su preme court of Tennessee, this 29th day of December, in the yea of our Lord one thousand eight hundred and ninety-eight.

D. L. SNODGRASS,
Chief Justice of the Supreme Court of Tennessee.

28 I acknowledge service of notice of the within, & copy of same has been left with me.
This 4 Jan'y, 1899.

G. W. PICKLE,
Att'y Gen'l for Tennessee.

29 In the Supreme Court of the United States.

W. B. AUSTIN
vs.
STATE OF TENNESSEE.

Writ of error to the supreme court of Tennessee.

Assignment of Error.

The plaintiff in error, W. B. Austin, comes, by his attorney, feeling himself to be aggrieved by the findings and judgment of the supreme court of Tennessee in the above-entitled cause, and assigns errors thereto as follows:

I.

That the supreme court of Tennessee erred in holding and adjudging that the statute passed by the General Assembly of the State of Tennessee, and constituting chapter 30 of the Acts of 1897, under which the plaintiff in error was convicted in the circuit court of Monroe county, Tennessee, and sentenced to pay a fine of $50.00, was not, in so far as the act of the plaintiff in error for which he was indicted is concerned, in conflict with section 8 of article 1 of the Constitution of the United States, and in adjudging that he pay a fine as guilty and in default thereof be in custody of the sheriff of Monroe county, Tennessee.

II.

That the supreme court of Tennessee erred in holding and adjudging that the statute passed by the General Assembly of the State of Tennessee, and constituting chapter 30 of the Acts of 1897, under which the plaintiff in error was convicted in the circuit court of Monroe county, Tennessee, and sentenced to pay a fine of $50.00,
30 was not, in so far as the act of the plaintiff in error for which he was indicted is concerned, in conflict with section 10 of article 1 of the Constitution of the United States, and in adjudging that he pay a fine as guilty and in default thereof be in custody of the sheriff of Monroe county, Tennessee.

III.

That the said supreme court of Tennessee erred in holding and adjudging that cigarettes, for the sale of which plaintiff in error was convicted, are not legitimate articles of commerce, and are therefore not under the protection of section 8 or section 10 of article 1 of the Constitution, and that the regulation of com-

merce in said articles is therefore not within the power of Congress under said section of the Constitution of the United States, as aforesaid, but is under the power of the various States, and that therefore plaintiff in error was properly convicted of selling cigarettes in contravention of said act of the General Assembly of the State of Tennessee, it being chapter 30 of the Acts of 1897, although plaintiff in error had imported said cigarettes from another State and sold them in the original package in which imported.

IV.

That the said supreme court of Tennessee erred in holding that the package sold by plaintiff in error was not an original package in which imported, and that therefore the sale by plaintiff in error was not an act of interstate commerce, subject under sections 8 and 10 of the Constitution of the United States to only congressional regulation and not to the regulation and control of any of the States.

V.

That the validity of the aforesaid statute passed by the General Assembly of the State of Tennessee in the year 1897 having been drawn in question by the plaintiff in error as applied to the act for which plaintiff in error was indicted, on the ground that said statute so applied constituted a regulation of interstate commerce,
31 and was therefore in contravention of the United States, the supreme court of Tennessee erred in that its decision was in favor of the validity of said statute as applied to the sale by plaintiff in error for which he was indicted, and in holding and adjudging that the same was, as so applied, not in conflict with the said section of the Constitution of the United States.

VI.

And the said W. B. Austin prays that the errors so complained of may be corrected, and that the judgment of the supreme court of Tennessee may be reversed, annulled, and altogether held for nothing, and that plaintiff in error be discharged and restored to all things which he has lost by occasion of the said erroneous judgment aforesaid.

W. W. FULLER,
J. PARKER,
Atto's for Pl'ff in Error.

Endorsed on cover: File No., 17,259. Tennessee supreme court. Term No., 186. W. B. Austin, plaintiff in error, *vs.* The State of Tennessee. Filed January 14th, 1899.

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